

STATE OF IDAHO )  
COUNTY OF KOOTENAI ) ss  
FILED:

FEB 27 3 23 PM '89

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

IN THE MATTER OF THE GENERAL )  
DETERMINATION OF THE RIGHTS TO )  
THE USE OF THE SURFACE WATERS )  
OF TWIN LAKES, INCLUDING )  
TRIBUTARIES AND OUTLETS. )

CIVIL NO. 32572

MEMORANDUM DECISION

----- )  
THE STATE OF IDAHO, )  
Department of Water Resources, )

Plaintiff, )

v. )

ABBOTT, Knox and Spouse; )  
et al., )

Defendants. )  
----- )

This proceeding was brought pursuant to Section 42-1406 Idaho Code for the purpose of adjudicating the rights of the various users of the surface waters of Twin Lakes, including its tributaries and outlets, within Kootenai County, Idaho. The Director of the Idaho Department of Water Resources filed his petition seeking such adjudication, after he received petitions signed by one hundred and twenty-two users of waters from Twin Lakes.

MEMORANDUM DECISION

Several orders of joinder were later entered by this Court and a total of approximately 1,154 landowners and potential water right claimants were made parties to this adjudication proceedings. A total of 414 notices of claims to water rights were filed before the deadline before filing claims. An additional seven claims were filed after the deadline and were treated herein as having been timely filed.

This Court ordered the Department of Water Resources to conduct a survey and make an examination of the waters of Twin Lakes, including the tributaries and outlets and to prepare a map showing the course of the waters, the location of the diversion of the water therefrom and the legal subdivisions of the land which had been irrigated, along with the other uses being made of the diverted water. The department was further directed to prepare a list and/or show on said map of present users and/or prior claimants to the water being used, and the location of their uses.

The Department of Water Resources did prepare such report of water rights, entitled Proposed Finding of Water Rights in the Twin Lakes-Rathdrum Creek Drainage Basin which has been filed with this Court and later amended in two instances. The first of these amendments added page 100A, entitled Claims Not Submitted to the Report. The second amendment deleted one water right (95-2002) from the report (on pages 95 and 149) which was not properly included in the adjudication.

After the Director of the Department of Water Resources filed

its report with the court, various individuals or groups filed their objections to such report, which were responded to by the Director of said department. These objections were four in number:

1. By John Sylte and Evelyn Sylte, husband and wife; Gordon Sylte and Judith Sylte, husband and wife; and Sylte Ranch, hereinafter referred to as the Syltes.
2. By Betty Rose Hogan.
3. By Chester A. Park, Diane J. Park, Daniel M. Park, Chester R. Park, Naomi J. Park, Elizabeth Stevens, Clara Primmer and Dean A. Primmer.
4. By the Rathdrum Creek Drainage Association.

Michael J. Newell appeared before this Court as the legal representative of all the aforesaid Objectors.

A. Lynne Krogh-Hampe, Deputy Attorney General, represented the Department of Water Resources.

The United States by and through its attorney, for the District of Idaho, had earlier contacted this court on behalf of its affected agency, as a claimant in this general water right adjudication. However, the United States did not petition to intervene, nor has it been joined as a party by the objectors, and it did not file any objections to the Director's Report. In a memorandum to this Court, the Assistant United States Attorney, Warren S. Derbidge, stated:

"United States fully supports the petition of the State of Idaho in this litigation and perceives that the interest of judicial economy are best served by the United States refraining from participating in the trial."

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Before the subsequent trial of this matter, this Court did enter an Order Authorizing Interim Administration of Water Rights in the Twin Lakes Water System on February 2, 1988, pursuant to Chapter 6, Title 42 of the Idaho Code.

\* \* \* \* \*

Pursuant to Section 42-1412 I.C., the Director's Report, the objections, the responses to objections, notice of claims and any negotiated agreements between the State of Idaho and any federal reserved water right claimant constituted the pleadings herein. The portions of the Director's Report for which no objection was filed were admitted and accepted by this Court as true facts. (Sec. 42-1412(9)). This Court conducted a trial without a jury on said objections and issues this memorandum decision setting forth its determinations.

\* \* \* \* \*

The Objectors in this case submitted fourteen notices of claims to water rights of which twelve were recommended in the Director's proposed findings, as extracted for the purpose of setting out the following list. These twelve water rights are in the total amount of 6.56 cubic feet per second:

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
LISTING OF RIGHTS

OBJECTORS' LISTING OF RIGHTS

RIGHT NUMBER	NAME AND ADDRESS	PRIORITY DATE	USE	PERIOD FROM TO	MAX AMOUNT MAX RATE	DIVERSION POINT	PLACE OF USE AND ACREAGE	BASIS FOR RIGHT
		SOURCE: RATHORUM CREEK		TRIBUTARY TO: SINKS				
95-0734	SYLTE, JOHN SYLTE, EVELYN ROUTE 1 BOX 690 RATHORUM ID 83858	05-01-1875	STOCKWATER	01-01 12-31	4.10 AFA .07 CFS	LT04 S30 T52N R04W	LT04 S30 T52N R04W	BENEFICIAL USE
REMARKS: FOR 300 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.								
95-0943	PARK, CHESTER R. RT. 4 BOX 730 RATHORUM ID 83858	05-01-1945	STOCKWATER	01-01 12-31	1.40 AFA .03 CFS	IN11W S20 T52N R04W	IN11W S20 T52N R04W	BENEFICIAL USE
REMARKS: FOR 100 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.								
95-0731	WILLADSEN, MARVIN WILLADSEN, SHIRLEY J. RT. 4 BOX 812 RATHORUM ID 83858	10-01-1947	STOCKWATER	01-01 12-31	1.40 AFA .03 CFS	NESE SESE	SWSE S19 T52N R04W IN11W SE11W S30 T52N R04W	BENEFICIAL USE
REMARKS: IN-STREAM STOCKWATERING, NATURAL FLOW APPROPRIATION.								
95-0733	SYLTE RANCH INC. RT. 1 BOX 690 RATHORUM ID 83858	05-01-1950	IRRIGATION	03-15 11-15	1.00 CFS	LT03 S30 T52N R04W	NESE(123) SESW(12) LT03(105) LT04(10) LT04 S30 S30 T52N R04W T52N R04W	BENEFICIAL USE
REMARKS: FOR 1000 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.								
						50 ACRES*		
			STOCKWATER	01-01 12-31	14.00 AFA .23 CFS	LT03 S30 T52N R04W	LT04	
						---*AFA 1.23*2CFS		
95-2096	PARK, CHESTER R. PARK, NAOMI RT. 4 BOX 730 RATHORUM ID 83858	06-28-1952	IRRIGATION	03-15 11-15	.07 CFS	IN11W S20 T52N R04W	IN11W(3.5) S20 T52N R04W	LICENSE
REMARKS: NATURAL FLOW APPROPRIATION.								
95-7269	HOGAN, JERRY E. HOGAN, BETTY HOSE RT. 4 BOX 800 RATHORUM ID 83858	05-29-1973	IRRIGATION	03-15 11-15	.70 CFS	MYSW S20 T52N R04W	MYSW(10) S20 T52N R04W	PERMIT
REMARKS: NATURAL FLOW APPROPRIATION.								
						10 ACRES*		
95-7604	SYLTE RANCH INC. RT. 4 BOX 854 RATHORUM ID 83858	04-14-1976	IRRIGATION	03-15 11-15	.34 CFS	LT03 S30 T52N R04W	SWSE(08) NESW(15) INSE(20) S30 T52N R04W	LICENSE
REMARKS: NATURAL FLOW APPROPRIATION.								
						63 ACRES*		

95-7615	HOGAN, JENNY E. HOGAN, BETTY ROSE RT. 4 BOX 800 RATHORUM 10 83858 REMARKS: FOR 10 HEAD OF STOCK, NATURAL FLOW APPROPRIATION.	04-30-1976 IRRIGATION 03-15 11-15	.10 CFS	S20W S20 T52N R04W S20 T52N R04W	SW1/4(05) LICENSE	
						* 5 ACRES*
		STOCKWATER 01-01	.20 AFA .02 CFS			SAME AS OTHER USE
		DOMESTIC 01-01 12-31	1.20 AFA .03 CFS			SAME AS OTHER USE
					*AFA	
			.13 CFS			
95-7617	WILLADSEN, MARVIN K. WILLADSEN, SHIRLEY J. RT. 4 BOX 812 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	04-30-1976 IRRIGATION 03-15 11-15	4.06 CFS	M1/4E S30 T52N R04W NESE(14) S19 SESE(14) S19 SESE(19) NESW(25) NWSW(07) SWSE(19) SWSW(25) SESW(39) SESW S30 S20 M1/4E(20) T52N R04W M1/4E(20) SESW(19) S30 T52N R04W	PERMIT	
		FIRE PROTECTION 01-01 12-31	4.06 CFS ---*AFA			* 203 ACRES*
			4.06 CFS			
95-7630	SYLVE, GOODEN SYLVE, JUDITH RT. 1 BOX 690 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	05-24-1976 IRRIGATION 03-15 11-15	.10 CFS	LT03 S30 T52N R04W LT03(05) S30 T52N R04W LT04(05) S30 T52N R04W	PERMIT	
						* 10 ACRES*
95-7710	PRIMMER, DEAN A. PRIMMER, CLARA J. RT. 4 BOX 810 RATHORUM 10 83858 REMARKS: NATURAL FLOW	06-27-1977 IRRIGATION 03-15 11-15	.20 CFS	SWSE(19) T52N R04W SESE(10) S19 T52N R04W	PERMIT	
						* 10 ACRES*
95-7727	PARK, CHESTER A. PARK, DIANE J. RT. 4 BOX 712 RATHORUM 10 83858 REMARKS: NATURAL FLOW APPROPRIATION.	05-09-1977 IRRIGATION 03-15 11-15	.10 CFS	M1/4W S20 T52N R04W M1/4W(10) S20 T52N R04W	PERMIT	
						* 10 ACRES*

\* \* \* \* \*

The two claimed water rights which were recommended for disallowal or p. 98 of the Proposed Findings, were based on permits which had been cancelled. None of these claims included storage as a purpose of the water rights.

The first of these water rights (No. 95-0734) has a priority date of May 1, 1875. The other eleven water rights have priority dates of May 1, 1945 or later.

The points of diversion of all Objectors are located on Rathdrum Creek, which is downstream from the outlet of Lower Twin Lake.

The Twin Lakes Improvement Association filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Findings at p. 21 as Water Right No. 95-0974.

The U. S. Dept. of Interior, Bureau of Reclamation filed a notice of claim to a water right that included storage in Twin Lakes, which was recommended in the Proposed Finding at p. 21 as Water Right No. 95-0975.

Each of these two storage rights had a priority date of March 23, 1906.

The two water rights recommended which include storage were based on historic use. Those water rights recommended to the Rathdrum Creek Objectors were of both types: historic use rights and/or statutory rights.

The date of priority of statutory water rights related back to the date of posting the required notice or the date of filing an application with the proper department of the State of Idaho. The date of priority under the storage use rights is the date of appropriation of the water to the beneficial use.

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The Court's analysis of the objections to the proposed findings of fact and conclusions of law was made more difficult by the failure to use precise names, numbers or other specific designations for each objector. For example, the name Syltes is used throughout the pleadings herein without specific reference to which of the several claims are referenced, while these claims are referred to in the Director's Report as standing in the names of:

John and Evelyn Sylte (#95-0734)  
Sylte Ranch, Inc. (#95-0733)  
Sylte Ranch, Inc. (#95-7604)  
Gordon and Judith Sylte (#95-7630)

This Court had great difficulty in understanding what was meant by the term "Rathdrum Creek Drainage Association" which identified in the objection filed on September 14, 1987 as "comprising of several individual claimants as enumerated in the proposed findings of water rights in the Twin Lakes - Rathdrum Creek Drainage Basin". Recognizing there were hundreds of individual claimants enumerated in such proposed findings, such characterization was confusing. For the purpose of this opinion, this Court understands the name Rathdrum Creek Drainage Association, as used herein, to be a generic term encompassing all the individual Objectors who had previously filed their objections herein, and used for the purpose of amending (or supplementing) their previously filed objections to such findings. Similarly, this Court understands the term Rathdrum Creek Water Users to refer to the Objectors, as this Court is



unaware any entity by that name having filed an objection herein.

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Twin Lakes, originally known as Fish Lakes, is a body of water comprised of two lakes joined by a channel which flows from the upper lake to the lower lake. Fish Creek is the major tributary feeding Twin Lakes, and there are a number of smaller tributaries which also feed the lakes, some of which flow into the Upper Lake and some of which flow into the Lower Lake. Rathdrum Creek is the only outlet from the lakes, and it begins at the lower end of Lower Twin Lakes and flows southwesterly to Rathdrum Prairie.

Sometime around the turn of the century, the Spokane Valley Land & Water Company modified the natural features of the lakes for purposes of making water available for irrigation use in Rathdrum Prairie. The natural channel connecting the lakes was widened and deepened, and a dam and outlet structure was constructed at the lower end of Lower Twin Lake which enabled a portion of the water stored in Lower Twin Lake to be released downstream to Rathdrum Creek. The natural condition of Rathdrum Creek was also modified. Originally, Rathdrum Creek traveled a distance of approximately 4½ miles downstream from Lower Twin Lake to a place just south of the town of Rathdrum, where the waters disappeared into a sink area. This company constructed a ditch which captured the waters of Rathdrum Creek at the sink and carried them approximately four additional miles for the irrigation of lands in Rathdrum Prairie.

A portion of the storage made available by construction of dam and outlet structure was conveyed by said company to predecessors of the Twin Lakes Improvement Association on April 5, 1906. The remainder of the storage made available by construction of the dam and outlet structure, and the company diversion works, were acquired by East Greenacres Irrigation District by condemnation in 1921. From that time until 1977, the East Greenacres Irrigation District controlled the dam.

The water level of Twin Lakes and the vegetation lines around the lakes were relatively the same, both before and after the construction of the dam. The primary result the dam had on the water level was to hold the water at a higher point longer through the summer months.

This Court finds all the points of diversion of water which were actually used by the Spokane Valley Land and Water Company were points of diversion below the City of Rathdrum, and both the natural and stored water from Twin Lakes was diverted down Rathdrum Creek past the points of diversion of all the Objectors, and then diverted to flumes and channels which were constructed by the irrigation company.

Rathdrum Creek is the only natural outlet to Twin Lakes; however, the parties were not in agreement as to whether the outflow of Lower Twin Lakes (pre-dam construction) went over the top of the lip of Lower Twin Lakes at its lowest point, or whether its outlet was under water, surfacing to the top of the land at a lower level to form Rathdrum Creek, or, whether it

flowed over the top of the lip during periods of high water only and continued for the rest of the time underground as a spring.

In any event, before the dam was built the outflow water flowed in Rathdrum Creek for about four miles downstream to the John Sylte (#95-0734) place of diversion. Thereafter it flowed into a sink area and went back into the ground. At an early date, someone captured this water, before it flowed back into the sink, and transported it four and one-half miles for use an irrigation, thus completing an appropriation.

From conflicting evidence, this Court finds it was more probably true than not that the outlet waters of Twin Lakes flowed over the top of the lip during periods of high water and through the natural pre-dam obstruction at all times, forming the source waters for Rathdrum Creek.

This Court finds at the time the John Sylte and Evelyn Sylte Water Right #95-0734 was created in 1875 there was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin (Fish) Lakes, to provide .07 cubic foot per second to the appropriator on a continuous year-round basis.

This Court was persuaded in making this finding to a large extent by the historical testimony and report of David Osterberg. While not conclusive, it was more significant than other evidence regarding the natural condition of Rathdrum Creek in 1875 and before 1906.

This Court finds the natural state of Rathdrum Creek in 1875

was definitely not the same as the natural state in 1906 or now, assuming no storage facilities had ever been built. There have been changes in the area which affect the inflow into Twin Lakes area and the natural storage of the water therein. These would include such factors as changes in the climate and changes in the timber canopy in this drainage basin because of logging operations. - - - In addition, the natural flow condition of 1875, regarding Water Right #95-0734, was changed as a result of the construction of the dam and the outlet structure.

The case of Cartier v. Buck, 9 Ida. 571, involved a factual dispute regarding changes in conditions in a stream dating from the early 1860's until 1904. The Supreme Court discussed conflicting evidence on the subject before concluding the fact finder might have had some difficulty in arriving at the true state of facts as to change of such natural conditions.

While such natural condition of Rathdrum Creek is found to have existed in 1875, it is apparent that such condition has not existed on a year-round basis at all times since the dam and outlet structure were constructed in 1906.

Since 1906, evaporation and seepage from the impounded waters of Twin Lakes sometimes exceed natural tributary inflow to Twin Lakes. At such times, Twin Lakes is not a significant source of water to Rathdrum Creek, except for Water Right #95-0734. Therefore, when evaporation and seepage from the impounded waters of Twin Lakes exceed natural tributary inflow to Twin Lakes, the Rathdrum Creek appropriators, except for John and

Evelyn Sylte, No. 95-0734, are not entitled to the release of water from Twin Lakes, and the direct flow appropriators upstream from the outlet at the lower end of Lower Twin Lakes are entitled to divert the natural tributary inflow to Twin Lakes in accordance with their priorities.

An appropriator is entitled to maintenance of stream conditions substantially as they were at the time the appropriators made their appropriation, if a change in stream conditions would result in interference with the proper exercise of the right. Bennett v. Nourse, 22 Ida. 249, 125 P. 1038 (1912). At the time the appropriation (No. 95-0734) was made in 1875, there was always water in Rathdrum Creek to serve said water right.

The holders of water right #95-0734 are therefore entitled to waters from the source of their appropriation on a basis of priority over those storage rights Nos. 95-0974 and 95-0975. The waters of this basin are to be administered in such manner as to give effect to such priority.

This Court concludes the rights of all the other Objectors are limited to the natural tributary inflows to Twin Lakes, less evaporation and seepage from Twin Lakes.

A water right is different from other forms of property rights in that the water right is a usufructury right. The appropriator has the right to divert and make beneficial use of a portion of the public waters of the state, but he does not have a property right in the corpus of water while it is flowing in a

natural water source. Boise City Irrigation v. Stewart, 10 Ida. 38. Once the appropriator lawfully diverts the water from its natural source to his diversion works, the appropriator does become the owner of the corpus of the water lawfully diverted.

The Objectors have maintained there is no independent right to water storage, or to water stored for some future use, contending that water rights in Idaho are created by appropriations, and that appropriation requires diversion (except in certain instances).

Storage of spring flows of water for later use is recognized in Idaho. Idaho Code Sec. 42-202. Storage rights differ from direct flow rights in that water is impounded and stored for later use, while waters, subject to direct flow rights, are diverted for immediate use.

The use of a natural channel to convey stored water after impoundment is also statutorily recognized in Idaho. The water released downstream from an onstream reservoir may be commingled with the water naturally occurring in the stream, and may be reclaimed later. Sections 42-105, 42-801 and 49-802 I.C.

To accept the department's interpretation of the facts as they pertain to the 1875 Sylte water right (#95-0734), would be to deprive the holders of such water right of the use of the water to which they are entitled and to which use they have a prior right to those possessing the storage rights.

In the Carey Lake Reservoir Company v. Strunk case, 39 Ida. 332, the Supreme Court held the trial court should have allowed

the appellants to show, if they could, that they held a prior water right, that the coulee or wash in question was in fact a natural stream or watercourse, from which they had regularly received water appropriated by them, and that respondent had no right to maintain its dam without letting their water through. The case was remanded for retrial in accordance with that agreement.

Court concludes there are only two storage rights recognized as a result of this adjudication proceeding, to-wit:

1. Twin Lakes Improvement Association storage right between 0.0 to 6.4 feet on the staff gauge (95-0974);
2. Bureau of Reclamation's right between 6.4 to 10.4 feet on the staff gauge (95-0975).

An appropriator has the right to make a change in the use of the water so long as no injury results to the rights of other appropriators. After 1969, any person seeking to make a change in the use of water had to apply for and obtain approval of the proposed change as provided by Section 42-222 I.C. A change in use includes a change in the point of diversion, place of use, period of use, or nature of use. I.C. 42-222.

The testimony of Mr. George Maddox reached the conclusion that there were several wells in Twin Lakes area which actually drew water from Twin Lakes. It was the Objectors' contention that nothing in the Director's Report made any reference to any ground water wells and said Objectors contended this subject must be addressed by the Director's Report. - - - Mr. Haynes

testified in opposition to the Maddox conclusions and concluded the effect of the ground water withdrawals upon surface water supply were so small as to be both unmeasurable and insignificant.

This Court was persuaded, by a preponderance of the evidence, that these wells did not have a significant effect upon the surface water supply, which is the subject of the Director's Report herein.

This general adjudication of water rights was commenced by an order of the district court which determined the scope of the adjudication. Said order provided for a commencement of an adjudication of the rights to the use of the surface waters of Twin Lakes - Rathdrum Creek Drainage Basin and did not include a determination of ground water rights, including the elements of the ground water rights, or matters necessary for administration of ground water rights. The Joint Pretrial Statement filed herein did not include any issue of fact or law as to ground water, and it expressly provided that all other issues of law were abandoned.

Regarding the Rathdrum Creek Drainage Association claim that they have a vested right in storage rights in Rathdrum Creek, it is noted such claimants were required to submit a notice of claim for each water right claimed on a claim form prepared by the Idaho Department of Water Resources, setting forth each element of the water right claimed. Such claims must be filed in a timely matter. The evidence herein does not disclose any claim to a water right for storage purposes was submitted by the



Objectors. The time for filing such claims in this adjudication is past.

The Court concludes water stored by the holders of Water Rights Nos. 95-0974 and 95-0975 is not unappropriated water subject to appropriation by others.

Further, this Court concludes the Objectors have not acquired a portion of the water right recommended to the United States Bureau of Reclamation by adverse possession. The burden of proof is on the claimant of the water right to establish the elements of adverse possession, and the extent and amount of use by clear and convincing evidence. Gilbert v. Smith, 97 Ida. 735; Loosli v. Heseman, 66 Ida. 469. Sears v. Berryman, 101 Ida. 843.

In order to establish a water right based on adverse possession, it is necessary to prove by clear and convincing evidence the adverse use for a period of five years where the use is open, hostile, exclusive, continuous and under claim of right. It must be shown the adverse claimant's use of water deprived the appropriator of water at times when the appropriator actually needed the water. Sears v. Berryman, 101 Ida. 843. The Objectors have not met their burden in this regard.

This Court finds it is more likely than not the diversion of that unnamed stream, which is currently tributary to Twin Lakes immediately above the outlet of Lower Twin Lakes, was made about April 5, 1906 when the outlet was described as having been constructed.

An appropriator is entitled to the natural conditions of the

stream at the time of the appropriation. This Court concludes only those persons with priorities predating the 1906 change in the course of the unnamed stream are entitled to administration of said unnamed stream as if it were tributary to Rathdrum Creek instead of Twin Lakes.

Therefore this Court adopts the Director's proposed additional Finding of Fact No. 19:

Finding of Fact No. 19: The unnamed stream that is currently tributary to Twin Lakes immediately above the outlet at the lower end of Lower Twin Lakes was tributary to Rathdrum Creek immediately below the outlet prior to April 5, 1906.

and the Director's proposed additional Conclusion of Law No. 16:

Conclusion of Law No. 16: With respect to those rights to the use of water from Rathdrum Creek with a priority date prior to April 5, 1906, the unnamed stream that is currently tributary immediately above the outlet at the lower end of Lower Twin Lake will be administered as if the stream were tributary to Rathdrum Creek immediately below the outlet.

The Director's proposed Finding of Fact No. 14 shall be amended to read, in the final decree, as follows:

"There are periods during most years since 1906 when the seepage and evaporation losses from Twin Lakes exceed the natural tributary inflow."

Regarding the objection filed by Chester Park et al, this court concludes there has not been a water right established to an instream flow in Rathdrum Creek for recreation, fish and wildlife, because no one submitted a claim of notice for such water right in a timely manner. No notice of a claim to an instream flow for such purposes was filed by said Objectors, and

the time of filing notices of claims has past.

The Court further concludes there is no basis for a claim that water stored in Twin Lakes by the Bureau of Reclamation for recreations and wildlife purpose properly includes the release of water to Rathdrum Creek for instream flows for recreation and water life purposes. The place of use cannot be changed without application by the owner of the water right to the Idaho Department of Water Resources for approval of a change in place of use. See I.C. 42-108 and 42-222.

The Rathdrum Creek Drainage Association has requested an order from this court establishing "there is stored water rights which are still available for the purpose of appropriations by these Claimants." In this regard, this Court concludes future appropriations of water may not be established to water that is already appropriated and put to a beneficial use by the Spokane Valley Land and Water Company and its successors in interest. (Washington County Irr. District v. Talboy, 55 Ida. 382.)

The Rathdrum Creek Drainage Association has not met its burden of proof to establish the holders of the storage rights have lost their rights by forfeiture, abandonment, acquiescence, estoppel or laches.

This Court further concludes it is without authority to establish there is storage water available for appropriation in Twin Lakes. A future appropriation may be acquired only in accordance with the permit and license requirements of Title 42, Chapter 2 Idaho Code by proper application made to the Department

of Water Resources. - - - Such an order would be outside the scope of this adjudication proceeding.

The amended objection, presented by Rathdrum Creek Drainage Association, sought an order restricting further appropriations in the water system on the grounds the Idaho Department of Water Resources was continuing to allow further appropriations when there is no excess water available, causing injury to the vested right to the Objectors. This Court concludes it does not have the power or authority to issue such order because the purpose of a general adjudication is to determine the existing rights to the use of water in a water system. Chapter 14, Title 42 I.C. The Idaho Water Resources Department is authorized by the Idaho Legislature to hear and decide applications to appropriate water in the future.

This Court has considered the Syltes' objections to findings of fact Nos. 3, 5 and 6 and finds them without merit. The testimony and evidence at trial leaves this Court to believe those findings have been established by a preponderance of the evidence.

Regarding the Objectors' objection to finding of fact No. 18 on the basis that the listing of water rights did not include all the water which had been diverted and applied to the beneficial use on an historical basis by Syltes, this Court finds that all said claimed diversions were described in the listing of water rights.

This Court concludes there is a difference between storage

rights and natural flow water rights and the Objectors have not established any rights in the artificially stored waters in Twin Lakes. They have not diverted or appropriated such water.

This Court hereby adopts, as its own, all the uncontested proposed Findings of Fact and Conclusions of Law set forth in the Director's Report. (Pl's Ex. 45) In addition, it adopts the remaining (contested) proposed findings and conclusions, as herein amended and/or supplemented, as its own. This memorandum decision shall constitute to the Court's explanation of its decision in this regard.

This Court also adopts the prefatory material to the findings and fact in the Director's Report, along with the Instructions for Interpretating the Listing of Water Rights therein.

This Court will amend the Director's proposed findings of fact and proposed conclusions of law to reflect and effectuate this Court's determinations regarding No. 95-0734, as set forth in this memorandum decision. The attorney for the Idaho Water Resource Board is requested to prepare drafts of such proposed amendments for consideration by this Court. This will be done as a part of the proposed partial decrees later requested herein.

The attorney for the Idaho Department of Water Resources is requested to prepare a proposed partial decree, for the signature of this Court, embodying the adjudications made herein and in conformity with Sec. 42-1412(8) Idaho Code. Said decree shall include appropriate instructions to the clerk of this court

regarding notification to the Objectors and Claimants of each right as to which an objection was determined.

The attorney for the Department of Water Resources is requested to prepare a proposed partial decree, for presentation to this Court for those portions of parts I and II of the Director's Report, including all matter necessary for the efficient administration of the water rights, for which no objection has been filed, in conformity with Section 42-1412(9) Idaho Code.

If counsel for the Water Resources Board finds it necessary to seek further guidance from the court regarding the drafting of the proposed decrees, it is suggested this may be accomplished through a telephonic hearing, either formally or informally, depending upon the desires of both counsel.

DATED at Wallace, Idaho, this 22nd day of February, 1989.

  
District Judge

I hereby certify a true and correct copy  
of the foregoing MEMORANDUM DECISION  
was mailed, postage prepaid, this  
23rd day of February, 1989, to the  
following:

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Attorney at Law  
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Deputy Attorney General  
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Courtesy copy to:

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Warren S. Derbidge